LIBRARY
SUPREME COURT, U. S.

(Submitted with the Consent of the Parties)

Supreme Court, U. S.
FILED
MAR 15 19
MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-1164

ALFRED A. KNOPF, INC., VICTOR MARCHETTI, and JOHN D. MARKS,

Petitioners,

v.

WILLIAM COLBY, as Director of Central Intelligence of the United States; and HENRY KISSINGER, as Secretary of State of the United States,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF THE AUTHORS LEAGUE OF AMERICA, INC. AS *AMICUS CURIAE*

IRWIN KARP
Attorney for The Authors League of America, Inc., as amicus curiae
234 W. 44th Street
New York, N. Y. 10036

IN THE

Supreme Court of the United States

October Term, 1974

No.

ALFRED A. KNOPF, *et al.*,

Petitioners,

v.

WILLIAM COLBY, as Director of Central Intelligence of the United States, *et al.*,

Respondents.

BRIEF OF THE AUTHORS LEAGUE OF AMERICA, INC. AS *AMICUS CURIAE*

Interest of The Authors League

The Authors League of America is the national society of professional writers and dramatists. One of its principal concerns is the preservation of freedom of expression. The Authors League believes that the Injunction which restricts the freedom of expression of petitioning authors and publisher, and the system of censorship imposed by the two decisions of the Court of Appeals constitute one of the most serious threats in modern times to the First Amendment rights of authors, publishers and the public. Because The Authors League believes it is imperative that the Court review the decisions, it respectfully submits this brief *amicus curiae* in support of the petition, with the consent of the parties.

I.

Judicial Enforcement of the Contract is Limited by The First Amendment.

The First Amendment prohibits Congress, the Courts and Executive Agencies from imposing by contract and injunction restraints on freedom of expression that could not be constitutionally imposed by statute or regulation. *Shelly* v. *Kraemer*, 334 U.S. 1, 17 (1948); *Barrows* v. *Jackson*, 346 U.S. 249 (1953). And the Courts cannot nullify the First Amendment's mandate by a doctrine of "waiver". Mr. Marchetti did not "waive" his First Amendment rights to write about the CIA by signing the secrecy agreements. He was as bound to accept these restrictions as he would have been had they been imposed by regulation. Moreover, even if the contract constituted a waiver of those rights, the First Amendment bars courts from enforcing a contract's provisions by an injunction which restricts freedoms guaranteed by the Bill of Rights. *Shelly* v. *Kraemer, supra; Barrows* v. *Jackson, supra.*

Finally, and more important, the First Amendment rights at stake are not solely Petitioner's; and he did not have the power to waive them. As the Court emphasized in *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967), the First Amendment's guarantees "are not for the benefit of the press so much as for the benefit of all of us. A broadly defined freedom of the press assures the maintenance of our political system and an open society." (p. 389)

II.

The System of Prior Restraint Imposed by the Injunction Infringes The First Amendment Rights of Authors, Publishers and the Public.

(i) As this Court emphasized, the most effective and repressive form of censorship can evolve under a system

which requires authors and publishers to bear heavy expenses and burdens in order to vindicate their First Amendment rights; the threat of those burdens coerces many into self-censorship. *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 279 (1964); *Time, Inc.* v. *Hill*, 385 U.S. 374, 387 (1967). Few publishers could afford the process of executive and judicial "review" of the manuscript of an unpublished book, imposed by the two decisions of the Court of Appeals. Indeed, it is doubtful that even one as resolute as Knopf could afford the third round which it must endure—if certiorari is denied—before this Court would consider the grave constitutional issues presented at this stage, and ripe for consideration. If the system now erected by the Court of Appeals is left intact, then many books by former government employees and officials will go unpublished—because publishers canot afford to pay the costs required, under the Circuit Court's decisions, to challenge prior censorship by executive agencies. We urge the Court to grant certiorari so that the constitutionality of the contract, injunction and system of judicial "review" imposed by the Court of Appeals can be considered by this Court.

(ii) Infringement of the public's First Amendment right to be informed (and petitioners' rights to publish) are the only practical results of the system of prior censorship established by the injunction and the system of review mandated by the Court of Appeals. The public is entitled to read information and discussion of agencies so vital to its interests as the CIA. The most useful source of information, and criticism, is the writings of former government employees: Presidents Truman, Eisenhower and Johnson; advisers to Presidents; former CIA officials and other public servants. Their books have disclosed CIA activities in connection with the "Bay of Pigs", "uprisings" in Iran or Guatamala or the Congo, and other matters of public

interest. Events of the past two years should convince anyone that the public's vital need is not to suppress, but to compel vastly greater disclosure, of information about the operations of such executive agencies. But under the Court of Appeals' decisions, an unconstitutional system of prior censorship would be strengthened and could be extended to these former government employees and officials —at the very moment when events have demonstrated overwhelmingly how dangerous such censorship can be to the true security of the republic.

(iii) The mechanism of prior censorship by contract, injunction and limited judicial review under vague standards (and untenable "presumptions of regularity" by classifying officials) cannot even be justified on "practical" grounds. Obviously, former employees cannot be prevented from disclosing sensitive information to foreign governments by a contractual ban and an injunction. Spies and defectors do not publish books to convey secret information to unfriendly governments. They use other, more private means which cannot be reached by injunctions or judicial review. Moreover, former public officials disseminate information by speech as well as published works; e.g. in statements to individuals, to reporters and authors, to lecture audiences, and to television audiences during interviews. Unless the government obtained broad injunctions against all employees who signed secrecy contracts, and kept them under constant watch, it could not prevent them —by injunction—from orally communicating information such as petitioners proposed to publish in their book. The information would thus be available to foreign governments. The restraint on publication would only limit its effective distribution to the American public.

(iv) Indeed, restricting dissemination of information to the American public is the only practical consequence of the

secrecy contract-injunction system of prior censorship. As we noted in our *amicus curiae* brief on the previous petition for certiorari, any ex-employee could avoid this prior censorship by taking himself and the information in his head to another country, and writing and publishing his book there. At least one former CIA agent has since followed that course. NEWSWEEK magazine reports that a

> "onetime spook (who) has gone outside the country to publish his expose. The book is called 'Inside the Company: CIA Diary', and ex-agent Philip Agee avoided all attempts at prior censorship by having it first published in Great Britain [640 pages. *Penguin Books,* London]." (January 27, 1975. p. 28)

Under the Court of Appeals' decisions an author could be enjoined from distributing such a book in the United States. But again, foreign readers and unfriendly governments would have the material; and the only restraint would be on the right of the American public to receive the information. The Court of Appeals in effect confirmed this by ruling that the petitioners were even barred from publishing classified information that had been disclosed to the public by others, because this would lead readers to place more credence in it. Foreign intelligence-gathering agencies are not inhibited by these unrealistic assumptions. And it is clear that censorship for this reason is not intended to protect vital national defense information from disclosure to foreign agents, but rather to protect public officials against public opinion.

We respectfully submit that prior censorship of books and articles written by former government employees is repugnant to the letter and spirit of the First Amendment. The overwhelming accomplishment of this prior censorship is destruction or curtailment of the public's right to know,

and consequent fiascos such as the Bay of Pigs or the "destabilization" of a foreign government such as Chile's. This damage to the public's right to be informed, the foundation on which our democratic society depends, far outweighs any limited protection of "security" that might be claimed for prior censorship by contract and injunction.

CONCLUSION

It is respectfully submitted that the Petition for Certiorari should be granted.

Respectfully submitted,

IRWIN KARP
Attorney for the Authors League of America, Inc., as Amicus Curiae